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NO. 14087

IN THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT
NEW ORLEANS, LOUISIANA

UNITED STATES OF AMERICA, *Appellant*

versus

HENRY DEBROW, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FROM THE SOUTHERN DISTRICT OF MISSISSIPPI—JACKSON DIVISION

MEMORANDA FOR THE CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

No. 2165—CRIMINAL

UNITED STATES OF AMERICA

vs.

HENRY DEBROW

HONORABLE JOSEPH E. BROWN, United States Attorney, Federal Building, Jackson, Mississippi;

ATTORNEY FOR APPELLANT

HONORABLE E. B. TODD, Attorney at Law, 247 East Pascagoula Street, Jackson, Mississippi;

ATTORNEY FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14087

UNITED STATES OF AMERICA, *Appellant*

v.

HENRY DEBROW, *Appellee*

STIPULATION AS TO PRINTING OF RECORD

Subject to the approval of the court, it is hereby stipulated and agreed by and between counsel for the parties that only the following portions of the record on appeal received from the Clerk of the District Court need be printed, supplemented by this agreement:

1. The Indictment.
2. The motion to dismiss, without exhibits.
3. The opinion of the District Court sustaining the motion to dismiss.
4. The order of the District Court dismissing the indictment.
5. It is agreed that the typewritten record certified by the Clerk of the District Court constitutes the record on appeal and shall be considered by the court to the same extent as if it were printed; and that any party may print, as a part of or in connection with its or his brief, any portion of said typewritten record or may comment upon or otherwise use said typewritten record to the same extent as if it were printed.
6. The notice of appeal.
7. This stipulation.

/s/ Joseph E. Brown
United States Attorney
/s/ E. B. Todd
Attorney for Appellee

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 2165—CRIMINAL

UNITED STATES OF AMERICA, *Plaintiff*

vs.

HENRY DEBROW, *Defendant*

DEFENDANT

(FILED JULY 19, 1951)

THE GRAND JURY CHARGES:

1. That on or about the 9th day of April, 1951, at Jackson, and within the Southern District of Mississippi,

HENRY DEBROW,

the defendant herein, having duly taken an oath before a competent tribunal, to wit: a subcommittee of the Senate Committee on Expenditures in the Executive Departments known as the Subcommittee on Investigations, a duly created and authorized subcommittee of the United States Senate conducting official hearings in the Southern District of Mississippi, and inquiring in a matter then and there pending before the said subcommittee in which a law of the United States authorizes that an oath be administered, that he would testify truly, did unlawfully, knowingly and wilfully, and contrary to said oath, state a material matter which he did not believe to be true, that is to say:

2. That at the time and place aforesaid, the said Senate Subcommittee inquiring as aforesaid was conducting a

study and investigation of whether applicants for appointments to offices and places under the government of the United States had been and were being solicited and required by numerous persons within the State of Mississippi to make political contributions and donations as a condition precedent to receiving such appointments, and as a consideration in return for promises to use their support and influence in obtaining said offices and places for applicants seeking appointment thereto; and to determine whether the laws of the United States had been violated in connection with and as a result of such activities, the identity of any such person engaged therein, and the extent to which such improper and corrupt activities affected the operation of departments and agencies of the United States.

3. That at the time and place aforesaid, the defendant

HENRY DEBROW

duly appearing as a witness before the Senate Subcommittee and then and there being under oath as aforesaid, testified falsely before said Subcommittee with respect to the aforesaid material matter as follows:

> SENATOR HOEY: Go ahead and state just what that situation was.
>
> MR. DEBROW: * * * On the way up Professor Hill said to me, "Mr. Debrow, you knowing these fellows, I would like to make a thousand dollar contribution. Would you make it for me?" I said, "Providing you are present, I will be glad to."

4. That the aforesaid testimony of the defendant, as he then and there well knew and believed was untrue in that on the way up to the Century Building, at Jackson, Mississippi, to see the members of the Mississippi Democratic Committee, Professor Hill did not state to the defendant that he would like to make a thousand dollar contribution to the Committee and requested the defendant to make the contribution for him. (Sec. 1621, Title 18, U. S. C.)

COUNT II

THE GRAND JURY FURTHER CHARGES:

1. That at the time and place aforesaid, as is more fully set forth in Paragraphs 1 and 2 of the first Count, the allegations of which are hereby incorporated herein, the defendant

HENRY DEBROW

duly appeared as a witness before the said Senate Subcommittee and being under oath as aforesaid, testified falsely before the Senate Subcommittee with respect to the aforesaid material matter as follows:

SENATOR HOEY: Go ahead and state just what that situation was.

MR. DEBROW: * * * On the way up Professor Hill said to me, "Mr. Debrow, you knowing these fellows, I would like to make a thousand dollar contribution. Would you make it for me?" I said, "Providing you are present, I will be glad to."

So he gave me ten $100 bills on the way from the Walthall Hotel to the Century Building, which I accepted.

2. That the aforesaid testimony of the defendant as he then and there well knew and believed was untrue in that on the way up to the Century Building, at Jackson, Mississippi, to see the members of the Mississippi Democratic Committee, Professor Hill did not give the defendant ten $100 bills. (Sec. 1621, Title 18, U. S. C.)

COUNT III

THE GRAND JURY FURTHER CHARGES:

1. That at the time and place aforesaid, as is more fully set forth in Paragraphs 1 and 2 of the first Count, the allegations of which are hereby incorporated herein, the defendant

HENRY DEBROW

duly appeared as a witness before the said Senate Subcommittee and being under oath as aforesaid, testified

falsely before the Senate subcommittee with respect to the aforesaid material matter as follows:

MR. DEBROW: * * * After going up the street, approaching the Century Building, there stood the committee, you might say the whole committee, standing out in front and they had adjourned for the week.

So I walks up to the committee that consisted of Mr. Hood, Mr. Mize, Mr. Rogers, and I don't recall whether Mr. Jackson was present or not, but Mr. Beasley was present, and I think Miss Yelverton, the acting secretary. So I said, "A couple of gentlemen would like to talk to you fellows." They said, "We are closed for the week. Tell them to come back next week." That was it, so I turned around and I said, "You heard what they said, so let's go."

So I said, "I had better give you your thousand bucks back. I cannot make your contribution for you today, Professor."

2. That the aforesaid testimony of the defendant as he then and there well knew and believed was untrue in that after going up the street to the Century Building for the purpose of conferring with members of the Mississippi Democratic Committee the defendant did not state to Professor Hill that he could not make the contribution for the Professor that day and that he had better return to him his "thousand bucks". (Sec. 1621, Title 18, U. S. C.)

COUNT IV

THE GRAND JURY FURTHER CHARGES:

1. That at the time and place aforesaid, as is more fully set forth in Paragraphs 1 and 2 of the first Count, the allegations of which are hereby incorporated herein, the defendant

HENRY DEBROW

duly appearing as a witness before the said Senate Subcommittee and being under oath as aforesaid, testified falsely before the Senate subcommittee with respect to material matter as follows:

MR. FLANAGAN: I realize that.

MR. DEBROW: And I didn't know at that time, at the beginning when he mentioned the thousand dollars, that Mr. Ayres was an applicant for this rural route.

2. That the aforesaid testimony of the defendant, as he then and there well knew and believed, was untrue in that defendant in the beginning when the thousand dollars was mentioned at the Walthall Hotel did know that Mr. Ayres was an applicant for a job as rural mail carrier. (Sec. 1621, Title 18, U. S. C.)

A TRUE BILL

/s/ D. F. McCormick
Foreman

/s/ Joseph E. Brown
JOSEPH E. BROWN,
United States Attorney.

/s/ Ben Brooks
BEN BROOKS,
Special Assistant to the
Attorney General

(TITLE OMITTED)

MOTION TO DISMISS INDICTMENT

(FILED SEPTEMBER 5, 1951)

Comes the defendant Henry Debrow, who moves the Court to dismiss the indictment pending against him, for the following reasons:

FIRST

That the indictment fails to allege that an oath was administered to this defendant on the occasion complained of by any person authorized to administer an oath; and the indictment fails to charge the defendant with the commission of any crime known to the law.

SECOND

That the indictment charges that this defendant unlawfully, knowingly and wilfully, and contrary to said oath,

state a material matter which he did not believe to be true, such charge being made in Paragraph One of Count One of the indictment, but in which paragraph the alleged material matter is not set forth.

THIRD

That in the Third Paragraph of Count One of said indictment, and in which Paragraph the alleged material matter is set forth, the indictment therein fails to charge that this defendant wilfully so testified. That said Paragraph fails to charge or allege to what extent or in what manner such testimony was material to the issue involved.

FOURTH

That in Count Two of the indictment, and in which Count the alleged material matter is set forth, the indictment therein fails to charge that this defendant wilfully so testified, and therein fails to charge or allege wherein or to what extent such testimony was material to the issue involved.

FIFTH

That in the Second Count of the indictment, and in which Count the alleged material matter is set forth, the indictment therein fails to charge that this defendant wilfully so testified, and such Count fails to charge or allege wherein or to what extent such testimony was material to the issue involved.

SIXTH

That in the Third Count of the indictment, and in which Count the alleged material matter is set forth, the indictment therein fails to charge that this defendant wilfully so testified, and such Count fails to charge or allege wherein or to what extent such testimony was material to the issue involved.

SEVENTH

That in the Fourth Count of the indictment, and in which Count the alleged material matter is set forth, the indictment therein fails to charge that this defendant wilfully so testified, and such Count fails to charge or allege

wherein or to what extent such testimony was material to the issue involved.

EIGHTH

That the wording of the indictment is too vague, indefinite and uncertain to charge the defendant with any specific offense, and is, as a whole, an attempt on the part of the Government, to select a small portion of the testimony of this defendant, and to magnify such testimony, without giving the defendant the benefit of material statements made prior to and after the portions of his testimony made on the occasion complained of, and thereby causing the defendant to be prejudiced, at the very outset, in the minds of the trial jury. That there is attached hereto as a part hereof, a true copy of this defendant's testimony on said occasion, and attested under oath of this defendant.

Respectfully submitted:

/s/ E. B. Todd
E. B. Todd, Attorney for
Henry Debrow, defendant.

A true copy of above motion delivered to Hon. Joseph E. Brown, U. S. District Attorney, this September 5, 1951.

/s/ E. B. Todd
E. B. TODD, Attorney.

(TITLE OMITTED)

ORDER

(FILED FEBRUARY 11, 1952)

This cause this day came on for hearing on the motion to dismiss in the above numbered and entitled cause, and the Court having heard and considered same fully, it is considered and so

Ordered,

that the motion to dismiss in above numbered and entitled cause be and the same hereby is dismissed.

ORDERED, this the 6th, day of February, 1952.

/s/ Allen Cox
UNITED STATES DISTRICT JUDGE
ENTERED: COB 5 P 977

(TITLE OMITTED)

OPINION

(FILED FEBRUARY 11, 1952)

The indictments in these cases are identical in language insofar as the question before the Court is concerned and undertake to state cases against the various defendants under Section 1621, Title 18, United States Code.

In each of them it is stated "the defendant herein having taken an oath before a competent tribunal, to-wit, a sub-committee of the Senate Committee on Expenditures in the Executive Departments, etc.".

These indictments are challenged on many grounds, which the Court is not now considereing, and this decision is based on a ground common to them all, that is to say, the failure of the indictments to set out who administered the oath and by what authority he acted.

If this be an essential element of a good indictment under the Perjury Statute (Section 1621, Title 18, United States Code), then we need only cite the opinion of Hutcheson, Circuit Judge, in *Grimsley v United States*, 50 Fed. 2nd 509, in which he says: "Indictment without proof can not support a conviction, so proof without indictment can not."; and the case of *Sutton vs United States*, 157 Fed. 2nd 663 to 671, in which the Court of Appeals of the United States for the Fifth Circuit, speaking through Circuit Judge Holmes, makes it perfectly clear that no streamlining of pleading in criminal cases can ever authorize or justify the omission from an indictment of any essential element of the crime sought to be charged.

This then brings the Court to a consideration of the question as to whether or not it is essential to tell the defendant in a perjury charge clearly who administered the oath to him and by what authority.

In the case of Hilliard vs. United States, 24 Fed. 2nd 99, Foster Circuit Judge, speaking for the Court says, "In charging perjury it is sufficient, but it is also necessary to set forth the substance of the offense, *and to show before*

whom the oath was taken, with the averment that the officer taking it had authority to administer it." (Emphasis added). It is true that here the Court was considering the question in the light of Rev. St. 5396 (18 U. S. C. A., Sec. 558) and the argument is made that since Congress did not bring this Section forward in the recodification, this is no longer binding nor sound law. With this I can not agree.

Almost from the beginning of the Republic, such a statute has been a part of our law and my thought is that in its enactment Congress was saying that no matter how many technical matters may be left out of an indictment for perjury, you must give the defendant the name and the authority of the person who administered the oath. I think this was merely the recognition by the legislative branch of the government of the justice of this and the necessity for it, if defendants were to have a fair chance to know what they were charged with.

This admonition of the Congress, seeking to safeguard the rights of citizens, should not be lightly cast aside by any United States prosecuting officer, nor by any Judge—this judgment and considered opinion of the Congress, made up of laymen and of lawyers, carries great weight with me. I think they meant to say, and I think, that the lenguage "Having duly taken an oath" is nothing but a conclusion of the pleader.

It is argued that by failing to bring this section forward in the recodification, Congress meant to abandon this. I think what they meant to say was that this principle is so thoroughly embedded in our law that it is not necessary longer to have it in the Statutes and make more cumbersome an already exceedingly large collection of Statutes.

It surely can not be argued that by failing to bring the Statute forward they meant to say it is no longer necessary to set out in the indictment that the matter was before a competent tribunal; that the matter sworn to was false, and that it was material. How then can it be said that the other necessary averment set out in the statute was intended to be no longer the law?

I think it is still the law. The motions to dismiss are sustained.

/s/ Allen Cox
ALLEN COX, United States
District Judge

(TITLE OMITTED)

NOTICE OF APPEAL

(FILED FEBRUARY 29TH, 1952)

The United States of America hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order, decision and judgment of the United States District Court for the Southern District of Mississippi, Jackson Division, entered February 6, 1952, dismissing the indictment in this cause charging the defendant with violation of Title 18, Sec. 1621, United States Code, being an indictment charging the said defendant with perjury.

A copy of the Court's order dismissing the indictment and the opinion are hereto attached as Exhibits 1 and 2, respectively, and made a part hereof by reference.

This Notice of Appeal is prepared and given in accordance with Rule 37 of the Federal Rules of Criminal Procedure, and Title 18, Sec. 3731, United States Code.
Dated: February 29, 1952.

CERTIFICATE

I, B. L. TODD, JR., CLERK of the United States District Court for the Southern District of Mississippi, do hereby certify that the foregoing pages contain a true and correct transcript of the record in the case of UNITED STATES OF AMERICA V HENRY DEBROW, CRIMINAL ACTION NO. 2165, now on appeal to the Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, as the same now remains of record in my office at Jackson, Mississippi.

Witness my hand and seal of this office, this the 29th day of April, 1952.

/s/ B. L. Todd, Jr.
B. L. TODD, JR., Clerk
United States District Court
Southern District of Mississippi

That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of December 8, 1952.

UNITED STATES OF AMERICA,

No. 14087 versus

HENRY DEBROW.

On this day this cause was called, and after argument by Ben Brooks, Esq., Special Assistant to the Attorney General, for appellant, and Ben F. Cameron, Esq., for appellee, was submitted to the Court.

* * *

Opinion of the Court and Dissenting Opinion of Richard T. Rives, Circuit Judge. Filed April 10, 1953.

IN THE

United States Court of Appeals For the Fifth Circuit

No. 14087

UNITED STATES OF AMERICA, *Appellant*,

versus

HENRY DEBROW, *Appellee*.

No. 14088

UNITED STATES OF AMERICA, *Appellant*,

versus

JAMES H. WILKINSON, *Appellee*.

No. 14089

UNITED STATES OF AMERICA, *Appellant*,

versus

ROY F. BRASHIER, *Appellee*.

No. 14090

UNITED STATES OF AMERICA, *Appellant*,

versus

CURTIS ROOMES, *Appellee*.

— —

No. 14091

UNITED STATES OF AMERICA, *Appellant*,

versus

FORREST B. JACKSON, *Appellee*.

Appeals from the United States District Court for the Southern District of Mississippi.

(April 10, 1953.)

Before HUTCHESON, *Chief Judge*, and BORAH and RIVES, *Circuit Judges*.

BORAH, *Circuit Judge:* These five appeals are in separate but common cases in each of which the District Court sustained a motion to dismiss the indictment for reason of its failure to set forth all of the essential elements of the crime of perjury charged. They will be covered by one opinion as they have most matters in common.

On July 19, 1951, separate indictments were returned against each of the appellees in the United States District Court for the Southern District of Mississippi. Each indictment charged that "the defendant . . ., having taken an oath before a competent tribunal, to wit: a subcommittee of the Senate Committee on Expenditures in the Executive Departments . . . that he would testify truly, did unlawfully, knowingly and willfully, and contrary to said oath, state a material matter which he did not believe to be true, . . ." in violation of 18 U. S. C. § 1621. Section 1621 provides in pertinent part:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any

written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, . . ."

Prior to trial each of the appellees filed a separate motion to dismiss the indictment in which he was charged on the grounds, *inter alia*, that "said indictment fails to state an offense under § 1621, . . . or any other laws of the United States," and that said indictment "does not allege the essential elements of the crime of perjury, and does not allege essential and sufficient facts to support a verdict of guilty, and does not allege elements of the offense sufficiently to advise defendants in his defense." The motions came on for hearing and the District Court in an unreported opinion covering the five cases dismissed the indictments on the single and common ground that they failed to state all of the essential elements of a perjury charge in that the indictments did not set out who administered the oaths alleged by conclusion in the indictments and by what authority such person acted in the administration of such oath. Judgments of dismissal were entered in each case and the Government has appealed.

In concluding that the indictments should be dismissed the District Court relied in great measure on *Hilliard* v. *U. S.*, 5 Cir. 24 F. (2d) 99, wherein this guiding principal was announced: "In charging perjury, it is *sufficient*, but it is also *necessary* to set forth the substance of the offense, and to *show before whom the oath was taken, with the averment that the officer taking it had authority to administer it.*" (Emphasis supplied.) The Government seeks to avoid the impact of this language by arguing, (1) that this pronouncement is *dicta;* (2) that the language merely embodied the substance of R. S. 5396, 18 U. S. C. § 558, and no more supports the result reached than does this statute which was expressly repealed by Congress (62 Stat. 862; 80 Cong., 2d. Sess., c. 645, June 25, 1948); and finally (3) that the *Hilliard* case did not announce a principle of law which may be considered presently applicable under Rule 7(c) Federal Rules of Criminal Procedure. None of these contentions are sound.

In the *Hilliard* case the indictment set forth not only that the defendant took an oath before the District Court; it averred further that the oath was administered in open court by Edwin R. Williams, "the duly appointed and constituted clerk of the said court." The indictment was attacked on the ground, among others that it did not show that the defendant was properly sworn. In rejecting this contention that the charge was inadequate the court did so because the indictment contained the essential averment of the name of the person administering the oath and that this person was the duly appointed clerk of court.

The case of *United States* v. *Dickford*, 9 Cir., 168 F. (2d) 26, upon which appellant relies does not militate in the slightest against the holding in the *Hilliard* case that is was necessary to the validity of the indictment that it specify the name and authority of the person who administered the oath. It decided only that where as in that case, the indictment informed the defendant that the oath was administered by the clerk of court, that it was sufficient because it was implicit from the facts pleaded[1] that the officer administering the oath was in fact possessed of the requisite authority, and there was no need to spell it out further as the averments made substantially satisfied the requirement of 18 U. S. C. § 558 which does not prescribe the precise language in which the averment of authority is to be couched.

It is true that this court in the *Hilliard* case did consider the question there presented in the light of R. S. 5396, 18 U. S. C. § 558, and because this statute was expressly repealed prior to the return of the present indictments the argument is made that the decision in this case did not announce a principle of law presently applicable under Rule 7(c) Federal Rules of Criminal Procedure. This old statute now repealed served a useful purpose. It was passed to eliminate many of the requirements of a perjury indictment which were considered too exacting by providing that indictments may dispense with the recital of specified records and proceedings that were at common law often held to be necessary parts of the indictment. *Markham* v. *United States*, 160 U. S. 319, 16 S. Ct. 288, 40 L. Ed. 441. But despite its minimum requirements this statute plainly required that the indictment should "set forth the substance of the offense charged upon the defendant, . . . and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same . . ." It may not therefore be rightly said that its repeal destroyed the requirements which form the basis of the *Hilliard* decision. But regardless of this statute and its repeal it still remains a fundamental requirement that every essential element of the crime sought to be charged must be stated in the indictment and so stated that the defendant from the allegation of the indictment may understand what he is called upon to defend. This the Sixth Amendment of the federal constitution requires.

Rule 7(c), 18 U. S. C. following section 687, relating to indictments generally, provides that "the indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." This Rule like its forerunner, R. S. 5396, is designed to simplify indictments by

[1] 28 U. S. C., Sec. 525 vests all clerks and their deputies with authority to administer oaths.

eliminating unnecessary phraseology which needlessly burdened many indictments under the former practice. It does not and it was never intended that this rule should alter or modify the fundamental functions and requirements of indictments. Every ingredient or essential element of the offense sought to be charged must still be alleged in the indictment. *Wilson* v. *U. S.*, 5 Cir., 158 F. (2d) 659, cert. den. 67 S. Ct. 1094, 330 U. S. 850, 91 L. Ed. 1293.

The fact that strict requirements and formalities of criminal pleadings under the common law rules have been modified by modern practice and rules does not justify omission of matters of substance from allegations of an indictment. It has long been settled in the federal courts that an indictment in the language of the statute is ordinarily sufficient. But where the statute itself omits an essential element of the offense or includes it only by implication the indictment must descend to particulars and charge every constituent ingredient of which the crime is composed. If the indictment sets forth every material fact necessary to inform the defendant with reasonable certainty of the nature and cause of the accusation against him so as to enable him to make his defense, and avail himself of his conviction or acquittal for protection against another prosecution for the same offense, it is sufficient.

The indictments under review do not allege an offense in the words of the statute although they do refer to the applicable statute. These indictments do not attempt to charge the name of the officer or the person whom the Senate subcommittee called upon to administer the oath. They inform defendants only that the oath was taken before a competent tribunal, a subcommittee of the Senate Committee on Expenditures, etc. Rule 7(c) requires that an indictment shall contain a *definite* written statement of the *essential facts*, constituting the offense charged and the paramount provisions of the Sixth Amendment are "that in all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." We think that it is essential to inform the accused by whom it is charged that he was sworn, either by disclosing the name of the person administering the oath, or his official capacity, and that he was in fact possessed of the requisite authority. These are matters of substance which affect the substantial rights of the accused. It is apparent to us as it was to the Supreme Court[2] that there can be no conviction of perjury "unless the oath in regard to which the perjury was charged was taken before an officer of some kind, having authority to administer the oath." And to borrow language of Judge Hutcheson in

[2] *United States* v. *Hall*, 131 U. S. 50, 9 S. Ct. 663, 33 L. Ed. 97.

Grimsley v. *United States*, 5 Cir., 50 F. (2d) 509: "As indictment without proof cannot support a conviction, so proof without indictment cannot." There is hardly need to say more.

The judgments are, and each of them is,

AFFIRMED.

RIVES, *Circuit Judge*, dissenting:

Count I of the indictment against Henry Debrow set out in the footnote[1] is typical of the indictments in these five cases. All five are dismissed on the single and common ground that the name and

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1 "THE GRAND JURY CHARGES:

"1. That on or about the 9th day of April, 1951, at Jackson, and within the Southern District of Mississippi,

HENRY DEBROW,

the defendant herein, having duly taken an oath before a competent tribunal, to wit: a subcommittee of the Senate Committee on Expenditures in the Executive Departments known as the Subcommittee on Investigations, a duly created and authorized subcommittee of the United States Senate conducting official hearings in the Southern District of Mississippi, and inquiring in a matter then and there pending before the said subcommittee in which a law of the United States authorizes that an oath be administered, that he would testify truly, did unlawfully, knowingly and wilfully, and contrary to said oath, state a material matter which he did not believe to be true, that is to say:

"2. That at the time and place aforesaid, the said Senate Subcommittee inquiring as aforesaid was conducting a study and investigation of whether applicants for appointments to offices and places under the government of the United States had been and were being solicited and required by numerous persons within the State of Mississippi to make political contributions and donations as a condition precedent to receiving such appointments, and as a consideration in return for promises to use their support and influence in obtaining said offices and places for applicants seeking appointment thereto; and to determine whether the laws of the United States had been violated in connection with and as a result of such activities, the identity of any such person engaged therein, and the extent to which such improper and corrupt activities affected the operation of departments and agencies of the United States.

"3. That at the time and place aforesaid the defendant

HENRY DEBROW

duly appearing as a witness before the Senate Subcommitte and then and there being under oath as aforesaid, testified falsely before said Subcommittee with respect to the aforesaid material matter as follows:

"SENATOR HOEY: Go ahead and state just what that situation was.

"MR. DEBROW: * * * On the way up Professor Hill said to me, 'Mr. Debrow, you knowing these fellows, I would like to make a thousand dollar contribution. Would you make it for me?' I said, 'Providing you are present, I will be glad to.'

"4. That the aforesaid testimony of the defendant, as he then and there well knew and believed was untrue in that on the way up to the Century Building, at Jackson, Mississippi, to see the members of the Mississippi Democratic Committee, Professor Hill did not state to the defendant that he would like to make a thousand dollar contribution to the Committee and requested the defendant to make the contribution for him. (Sec. 1621, Title 18, U. S. C.)"

the authority of the person who administered the oath are essential elements of perjury and should be stated in the indictments.

With deference, I submit that the holding is extremely technical and is contrary to the letter and spirit of the pertinent Federal Rules of Criminal Procedure.[2]

Section 5396, Revised Statutes (Old 18 U. S. C. A. 558), under which *Hilliard* vs. *United States*, 24 F. 2d 99, was decided, has been repealed (62 Stat. 862; 80th Congress 2nd. Session c. 645, June 25, 1948). It had been replaced by the new rules and particularly by Rule 7(c).

If the indictment (see footnote 1, *supra*) is compared with the statute (substantially copied in main opinion), it will be seen that the indictment contains not merely the language of the statute but considerably more, and that was proper.[3]

It may be true that the language, "having duly taken an oath before a competent tribunal * * *" states a conclusion, while Rule 7(c) requires a "statemen of the essential *facts* constituting the offense charged * * *", but it seems to me that the real inquiry lies in the meaning of the word "essential" in that rule.

The roots of the principle that "essential facts" must be stated in the indictment are imbedded in the Constitution (Amendments V and VI). A bill of particulars cannot be used to cure an indictment fatally defective (*Jarl* vs. *United States*, 19 F. 2d. 891, 894, cf. *Williams* vs. *United States*, 164 F. 2d. 302), but it may be employed to discover all pertinent details, everything but the "essential facts". *Rosen* vs. *United States*, 161 U. S. 29, 34.

What facts then are "essential"? Is the present rule, as the majority holds, that "the indictment must descend to particulars and charge every constituent ingredient of which the crime is composed"? If so, we are still enmeshed in the technicalities of common law pleading, and the new rules have failed of their purpose (see Holtzoff, 3 F. R. D. 445, 448-449). It seems to me that

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2 "Rule 2.

"These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

"Rule 7(c)

"The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * *"

"Rule 52(a)

"Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

3 "There is only one exception to the rule that an indictment in the language of the statute is sufficient. The exception applies where the words of the statute do not contain all the essential elements of the offense". Norris, et al. vs. United States, 152 F. 2d 808, 810. See also Sutton vs. United States, 157 F. 2d 661, 663.

the "essential facts" required to be stated in the indictment do not include all of the details necessary to be proved by the Government, but only such facts as will meet the requirement of the Sixth Amendment that "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; * * *."

> "A defendant is informed of the nature and cause of the accusation against him if the indictment contains such description of the offense charged as will enable him to make his defence and to plead the judgment in bar of any further prosecution for the same crime." *Rosen* vs. *United States*, 161 U. S. 29, 34.

See also *Bartell* vs. *United States*, 227 U. S. 427, 431.

In *United States* vs. *Starks* (D. C. S. D. N. Y.), 6 F. R. D. 43, Judge Holtzoff stated the present test as to the sufficiency of an indictment as follows:

> "There are two tests that an indictment must meet: First, it must apprise the defendant of the specific offense with which he is charged . . . The second test is that the indictment must be sufficiently definite in order that if the defendant is later charged with the same offense he will be in a position to interpose a plea of double jeopardy."

It seems to me that a long line of decisions of this Court[4] culminating in *United States* vs. *Noral Williams, et al.*, No. 14,166, Ms., have established the principle that under the new rules an indictment which meets the requirements of the Sixth Amendment is sufficient.

When that test is applied to these indictments, it seems too clear for argument that each defendant was informed of the cause and nature of the offense with which he was charged so that he could properly prepare his defense if trial ensued and an attempt were thereafter made to try him again on the same charge, he could successfully interpose a plea of former jeopardy. The indictment charges, in accordance with one of the alternative provisions of the statute (18 U. S. C. A. 1621), that the oath was taken "before a competent tribunal". Further, it charges that the oath was "duly" taken (a fact not noted by my brothers). The Supreme Court has said that, "The word 'duly' means, in a proper way, or regularly, or according to law." *Robertson* vs. *Perkins*, 129 U. S.

[4] Among others see Norris vs. United States, 152 F. 2d 808, 810; Wilson vs. United States, 158 F. 2d. 659, 662; Lynch vs. United States, 189 F. 2d. 476, 479; cf. Sutton vs. United States, 157 F. 2d. 661, 663.

233, 236; followed in *Zechiel* vs. *Firemen's Fund Insurance Co.*, 61 F. 2d. 27. "Duly sworn" means a swearing according to law. 13 Words & Phrases (Perm. ed.) p. 627. The name and authority[5] of the officer who administered the oath are details which are matters of proof on the trial. So far as authority is concerned, any United States Senator, a member of the subcommittee, had authority to administer oaths to witnesses, 2 U. S. C. A. 191; *Sinclair* vs. *United States*, 279 U. S. 263, 291. Under the holding in *United States* vs. *Bickford*, 168 F. 2d. 26, the sufficiency of an averment that, "the oath was administered by some Senator, a member of the subcommittee", without naming him, could not be debated. The word "duly" carried that same meaning. In all probability, the defendants knew which Senator acted. If not, they could ascertain prior to trial by filing a motion for a bill of particulars. I cannot agree with the claim that the omission of this detail made their defenses more difficult, or prejudiced the defendants in any way. I, therefore, respectfully dissent.

Judgment.

Extract from the Minutes of April 10, 1953.

UNITED STATES OF AMERICA,

No. 14087 versus

HENRY DEBROW.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Rives, Circuit Judge, dissents."

* * *

[5] The Sixth Circuit has held that, "It is not required that the indictment must contain an allegation that an act done by a corporation was authorized by its officers and agents." Universal Milk Bottle Service vs. United States, 188 F. 2d. 959, 963.

Clerk's Certificate.

UNITED STATES OF AMERICA.

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

I, Oakley F. Dodd, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 16 to 30, next preceding this certificate, contain full, true and complete copies of the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 14087, wherein UNITED STATES OF AMERICA is appellant, and HENRY DERROW is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record, numbered from 1 to 15, are identical with the printed record upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 21st day of April, A. D. 1953.

/s/ OAKLEY F. DODD,
Clerk, U. S. Court of Appeals,
Fifth Circuit.

SEAL

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Supreme Court of the United States

No. 765, October Term, 1952

UNITED STATES OF AMERICA, PETITIONER

v.

HENRY DEBROW

Order allowing certiorari

Filed June 15, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

263722—53 U. S. GOVERNMENT PRINTING OFFICE: 1953